Supreme Court, U.S.
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No. 00-1661

In The

# Supreme Court of the United States

ORGANIZATION FOR COMPETITIVE MARKETS, INC.,

*Petitioner,*

v.

SEABOARD FARMS, INC.,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## RESPONDENT SEABOARD FARMS, INC.'S BRIEF IN OPPOSITION TO PETITIONER ORGANIZATION FOR COMPETITIVE MARKETS, INC.'S PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the United States Court of Appeals for the Eighth Circuit ("Eighth Circuit") was correct in affirming the Order of the United States District Court for the District of Nebraska ("District Court") holding that the District Court did not abuse its discretion in denying the Motion to Intervene ("Motion to Intervene") filed after trial and settlement of the underlying action by the Organization for Competitive Markets, Inc. ("OCM") when the Motion to Intervene did not raise a single claim or defense that shared a common question of law or fact with the underlying litigation?

## STATEMENT PURSUANT TO RULE 29.6

Pursuant to SUP. CT. R. 29.6, Seaboard Farms, Inc. ("Seaboard") identifies its parent corporation, Seaboard Corporation, which is a publicly held company that owns 10% or more of Seaboard's stock. There is no other publicly held company owning 10% or more of Seaboard's stock.

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## CITATIONS OF THE OFFICIAL REPORTS OF OPINIONS

The decision of the Eighth Circuit dated February 1, 2001, which OCM seeks to appeal to the Court is unreported and is set forth in OCM's Petition for a Writ of Certiorari ("OCM's Petition") at A1-A6. The Order of the Eighth Circuit dated March 20, 2001, denying OCM's petitions for rehearing *en banc* and for rehearing by the panel is also unreported and is set forth in OCM's Petition at A7. The decision of the District Court is reported at *Consolidated Nutrition Marketing Corp. v. Seaboard Farms, Inc.*, 2000 U.S. Dist. LEXIS 12526 (D. Neb. Aug. 28, 2000) and is set forth in OCM's Petition at A8-A22.

## STATEMENT OF THE CASE

### Background

On August 14, 1998, Consolidated filed a Complaint in the District Court alleging breach of contract, fraud and other claims against Seaboard arising from Seaboard's operation of its hog processing facility in Guymon, Oklahoma. The Complaint was publicly discussed in several agribusiness publications within a few weeks after it was filed. From the outset of the litigation, Consolidated Nutrition Marketing Corp., *et al.* ("Consolidated") sought from Seaboard confidential information and trade secrets about Seaboard's hog plant processes and proprietary business practices through disclosures and/or discovery. Seaboard refused to disclose such information without a limited protective order protecting its trade secrets and proprietary information.

On January 13, 1999, Seaboard and Consolidated agreed to, and the District Court entered, a Stipulation for Protective Order and Protective Order ("Protective Order") (Filing No. 25) to protect "certain documents, information or things which will be produced during discovery or otherwise contain[ing] sensitive and private marketing, business or other proprietary information" (OCM's Petition at A9).

Between March 6, 2000 and March 16, 2000, over one and one-half years after the Complaint was filed, the trial of the action between Seaboard and Consolidated was held. On March 16, 2000, Seaboard and Consolidated settled the case during trial.

**OCM's First Expressed Interest in this Action**

On June 2, 2000, seventy-eight (78) days after the trial was over and a final settlement of the case was reached, OCM, a complete stranger to the litigation, filed the Motion to Intervene seeking to materially modify the Protective Order entered by the District Court by "seeking public access to documents, evidence, information and other things currently deemed confidential" (Motion to Intervene at 1).

**District Court's Ruling**

After considering the Motion to Intervene and pertinent "briefs and indexes of evidence" submitted and filed by OCM and Seaboard, the District Court properly denied the Motion to Intervene (OCM's Petition at A8-9 and A21). OCM was, however, granted the right by the

District Court to inspect and review the entire transcript of the trial and OCM later posted the entire trial transcript on its website. *See* OCM's Petition at 2 ("OCM distributes reports on the issues raised in such litigation and provides public access to trial transcripts and other records from these actions. *See* <www.competitive-markets.com>").

OCM also was entitled to review numerous documents in the District Court not filed under seal as well as a great number of trial exhibits at the trial of this matter. (The Order on Final Pre-Trial Conference (Filing No. 345) identifies trial exhibit numbers 1-2174).[1] The only documents OCM was denied to inspect were a very limited number of confidential records relating to Seaboard's hog processing facility and its customers submitted in support of certain pre-trial motions filed under seal.

**Eighth Circuit's Ruling on Appeal**

On appeal, a three judge panel summarily affirmed the Order of the District Court holding "that the district court did not abuse its discretion in denying OCM's motion for permissive intervention because the motion did not raise a claim or defense that shared a common question of law or fact with the underlying litigation" (OCM's Petition at A6). The Eighth Circuit refused OCM's request for a rehearing *en banc* and for rehearing by the panel. There was no dissent to any decision in the lower courts.

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[1] OCM did not pursue access to the trial exhibits.

## REASON FOR DENYING THE WRIT

The Order of the District Court denying the Motion to Intervene – first made *after* trial and final settlement of the case – is subject to review under the abuse of discretion standard. The Eighth Circuit properly held the District Court did not abuse its discretion. No split of authority in the Courts of Appeals on this issue exists. And no other issue should be reached by the Court. This case simply presents no compelling reason for granting certiorari. Merely because one commercial business is sued by another does not mean the defendant business is stripped of its right to protect its confidential information, trade secrets and competitive processes. The Protective Order entered by the District Court protected those legitimate interests. OCM's claim to have a vital interest in this case is highly dubious. OCM's request to intervene in this action came almost *two years* after this lawsuit was publicly disclosed in the industry media which OCM claims to closely monitor. OCM's Motion to Intervene *first* came after the trial ended and a settlement was reached. No compelling interest has been shown. The District Court properly denied the Motion to Intervene and the Eighth Circuit properly affirmed the Order. *See Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978) ("It is uncontested . . . that the right to inspect and copy judicial records is not absolute. . . . [T]he decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case").

## I.

## REVIEW IS UNWARRANTED BECAUSE THE DISTRICT COURT'S DENIAL OF THE MOTION TO INTERVENE WAS MERELY A PROPER EXERCISE OF DISCRETION

### A. OCM Complains only of a Misapplication of a Rule of Law Which Is Not a Proper Basis for Granting a Writ of Certiorari

Misapplication of "a properly stated rule of law" seldom justifies review by the Court. *See* SUP. CT. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law"); *see also National Labor Relations Bd. v. Pittsburgh S.S. Co.*, 340 U.S. 498, 503 (1951) ("[W]e should adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations").

OCM contends the District Court denied the Motion to Intervene "on the theory that the interest" of OCM "in obtaining access to [sealed] records does not raise a question of law or fact in common with the main action, *as is required to intervene under Rule 24(b)*" (OCM's Petition at 7) (emphasis added). OCM thus quarrels only with an alleged "misapplication of a properly stated rule of law," *i.e.*, Rule 24(b). This is not a proper basis for granting certiorari. OCM's Petition should be denied.

### B. This Case Does Not Involve Unsettled Principles of Public Importance Nor Does it Involve a Real and Embarrassing Conflict of Opinion and Authority Between the Circuit Courts of Appeals

Only a case presenting an unsettled principle "of importance to the public" or a "real and embarrassing conflict of opinion" between and among the Circuit Courts of Appeals is worthy of the Court granting certiorari. *See Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 79 (1955) (" '[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public . . . and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals' ").

OCM's Petition raises neither. The discretion given to a trial court to enter and modify protective orders has been long standing and settled for decades if not longer. The Courts of Appeals are not in "embarrassing conflict" over this standard or its application. As will be shown below, the cases cited by OCM to "trump up" a conflict here to secure review by this Court are misplaced.

### C. OCM has Made No Obvious and Exceptional Showing of Error

"[R]eview on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10.

This Court has held even if "tension" exists in "the courts below," a petitioner still must make "an obvious and exceptional showing of error" to justify a grant of a writ of certiorari. *See Exxon Co., U.S.A. v. SOFEC, Inc.*, 517 U.S. 830, 841 (1996); *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) ("A court of law, such as this Court . . . cannot undertake to review . . . courts below in the absence of a very obvious and exceptional showing of error").

"[F]ar-reaching" questions not presented with sufficient clarity do not justify the grant of certiorari. *See Mishkin v. State of New York*, 383 U.S. 502, 512-513 (1966) ("The far-reaching . . . questions tendered by this claim are not presented by the record with sufficient clarity to require or justify their decision").

The District Court, after a careful review, denied OCM's Motion to Intervene. The appeal to the Eighth Circuit presented a single mundane question: Whether the District Court abused its discretion in denying the Motion to Intervene under FED. R. CIV. P. 24(b). The Eighth Circuit properly held it did not.

This Court has made clear that it will refrain from passing upon Constitutional issues "unless such adjudication is unavoidable":

> 'If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable'. . . . 'It is not the habit of the court to decide questions of a

> constitutional nature unless absolutely necessary to a decision of the case.'

*Clinton v. Jones*, 520 U.S. 681, 690 n.11 (1997).

OCM has sought to complicate and convolute the only issue (*i.e.*, whether the District Court abused its discretion) with collateral claims *unnecessary for adjudication by this Court and certainly not absolutely necessary to a decision in this case*, including claims of violation of First Amendment rights and an alleged common-law right of access to court records. These questions were unnecessary for decision by the lower courts and are not presented by the record with sufficient clarity to require or justify their decision by this Court. OCM's Petition should be denied.

### D. This Court has Made Clear that a Trial Court Is Given Substantial Latitude to Decide Issues Bearing Upon the Scope and Breadth of Protective Orders

FED. R. CIV. P. 26 "confers broad discretion on the trial court" to decide the degree of protection to be afforded by a protective order. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984) ("To be sure, Rule 26(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required").

This Court has made clear "the trial court" is in the "best position" to "weigh fairly" the needs of the parties and "fashion" appropriate protective orders. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984); *see also Degen v. United States*, 517 U.S. 820, 826 (1996).

The District Court carefully reviewed the breadth and scope of the Protective Order under Rule 26(c) and properly denied the Motion to Intervene. *See* OCM's Petition at A9-A11, and A21). The Eighth Circuit affirmed the District Court's Order without dissent.

The Eighth Circuit was correct. The District Court properly utilized its sound discretion in denying the Motion to Intervene. Review by the Court is unnecessary. OCM's Petition should be denied.

**E. "Good Cause" Supports Entry of the Protective Order**

OCM contends the "[P]rotective [O]rder was signed by the magistrate judge . . . despite the magistrate judge's failure to make any findings that there was 'good cause' for the protective order" as required under Rule 26(c) (OCM's Petition at 3). OCM is wrong. When the District Court entered the Protective Order it implicitly found "good cause" under Rule 26(c). *See e.g. Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949, 954 n.5 (8th Cir. 1979) ("[T]he district court entered a protective order restricting use of [plaintiff's] business information to defense counsel[.] . . . In so doing, the court implicitly conceded that any further disclosure would unduly harm [plaintiff] . . . The party requesting a protective order must initially show that the information sought to be protected is within the scope of Rule 26(c) and that he might be harmed by its disclosure"); *see also E.E.O.C. v. National Children's Ctr., Inc.*, 98 F.3d 1406, 1411 (D.C. Cir. 1996) ("[I]n *Seattle Times* [*Co. v. Rhinehart*], 467 U.S. 20[,] . . . the

Court considered and rejected the argument that protective orders must be supported by concrete factual showings").

The District Court carefully reviewed the record in determining whether the Motion to Intervene should be denied and specifically reviewed the circumstances under which the magistrate judge entered the Protective Order. *See e.g.* OCM's Petition at A9 n.2. The District Court did not abuse its discretion.

Although collateral to whether the District Court abused its discretion in denying the Motion to Intervene, the Protective Order was properly entered by the District Court. OCM's Petition should be denied.[2]

### F. This Court Has Not Recognized a Common-Law Right of Access to the Civil Court Records Purportedly at Issue (According to OCM) in this Case

OCM argues that the "Eighth Circuit's rulings are incompatible with the decisions of this Court recognizing a common-law right of access to such records" (OCM's Petition at 10). OCM's cited case law belies its argument.

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[2] As the Third Circuit has noted, the *Manual for Complex Litigation Second* favors the use of an "umbrella" protective order approach in complex cases: "That does not mean . . . that the party seeking the protective order must necessarily demonstrate . . . in the first instance on a document-by-document basis that each item should be protected. It is equally consistent with the proper allocation of evidentiary burdens for the court to construct a broad 'umbrella' protective order[.]" *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1122-23 (3d Cir. 1986).

*See* OCM's Petition at 10 (citing *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978)).

Indeed, *Nixon* explicitly states "[i]t is uncontested . . . that the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes." *Nixon*, 435 U.S. 589, 598.

OCM also mistakenly relies on *Press-Enter. Co. v. Superior Court of California, Riverside, Cty.*, 464 U.S. 501 (1984) (OCM's Petition at 10). The *Press-Enter. Co.* case concerned only whether *voir dire* in a criminal trial of a violent crime should be open to the public and the press. The *Press-Enter. Co.* holding is premised on "the broad public interest" of providing an "outlet" for emotions such as "outrage and hostility" in criminal cases. *See Press-Enter. Co.*, 464 U.S. 501, 509.

Seaboard and Consolidated's action was a civil action and did not involve any "violent crimes." The denial of the Motion to Intervene did not bear upon any cathartic public interest.

Further authority on which OCM relies only applies to limited fact patterns and do not support OCM's Petition. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564 (1980) ("[This case addresses] whether a *criminal trial* itself may be closed to the public upon the unopposed request of a defendant") (emphasis added); *Globe Newspaper Co. v. Superior Court for Norfolk Cty.*, 457 U.S. 596, 602 (1982) ("[T]rial court's order . . . that holds that [Massachusetts statute] § 16 A requires, under all circumstances, the exclusion of the press and general public

during the testimony of a minor victim in a sex-offense trial").

OCM argues that "the public also may have a First Amendment right to obtain access to court records in civil cases." *See* OCM Petition at 10 n.4. OCM is in error. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984) ("A litigant has no First Amendment right of access to information made available only for purposes of trying his suit").

OCM's attempts to "extrapolat[e] from . . . criminal cases" (*see* OCM's Petition at 11) is misguided. As Justice O'Connor has noted, criminal cases are distinguishable from civil cases and carry no "implications outside the context of criminal trials." *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 611 (1982) ("In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 . . . the Court held that the First Amendment protects the right of press and public to attend criminal trials. I do not interpret that decision to shelter every right that is 'necessary to the enjoyment of other First Amendment rights.' . . . Instead, *Richmond Newspapers* rests upon our long history of open criminal trials and the special value, for both public and accused, of that openness. As the plurality opinion in *Richmond Newspapers* stresses, 'it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted.' . . . Thus, I interpret neither *Richmond Newspapers* nor the Court's decision today to carry any implications outside the context of criminal trials") (O'Connor, J., concurring) (citing *Richmond Newspapers*, 448 U.S. at 575).

### G. There Is No Conflict Between the District Court Decision and the Circuit Courts as Alleged by OCM

OCM contends that "[b]ecause the ruling is at odds both with the decisions of eight other circuit courts of appeals on *precisely the same issue* . . . this Court should grant review." *See* OCM's Petition at 2 (emphasis added). OCM's contention is plainly wrong. The Court of Appeals' decisions to which OCM cites (*see* OCM's Petition at 6-7) are inapposite.

The only issue that may be reviewed by this Court is whether the Eighth Circuit erred in holding the District Court did not abuse its discretion in denying the Motion to Intervene. The cases cited by OCM either: (i) support collateral issue(s); (ii) were decided on disparate factual premises; (iii) are distinguishable, or (iv) ultimately provide no support to OCM's efforts to obtain a writ of certiorari.

For example, OCM's reliance upon *In re the Knoxville News-Sentinel Co., Inc.*, 723 F.2d 470 (6th Cir. 1983) is puzzling. *Knoxville News-Sentinel* had nothing to do with a district court's proper use of sound discretion in denying a motion to intervene. Moreover, *Knoxville News-Sentinel*, to the extent it is applicable, forcefully undermines OCM's position and makes clear that only "extraordinary circumstances" justify the reversal of a protective order. *See In re the Knoxville News-Sentinel Co., Inc.*, 723 F.2d 470, 478 (6th Cir. 1983) ("[W]e do note that the bank placed significant reliance upon the protective order. Once placed in this position, only 'extraordinary circumstances' or 'compelling need' warrant the reversal of a

protective order. . . . The particular facts of this case indicate no extraordinary circumstance or compelling need").

*Stone v. University of Md. Med. Sys. Corp.*, 855 F.2d 178 (4th Cir. 1988) also is not applicable. In *Stone*, the Sixth Circuit rejected the district court's perfunctory order granting the parties' request to seal "the entire record." *See Stone v. University of Md. Med. Sys. Corp.*, 855 F.2d 178, 180 (4th Cir. 1988). Unlike *Stone*, Seaboard and Consolidated tried their case in a courtroom open to the public (including OCM) and the entire trial transcript has been publicly displayed by OCM on its website. *Stone* is clearly distinguishable.

*Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775 (1st Cir. 1988) was narrowly decided on jurisdictional grounds regarding the proper exercise of the "power" of a trial court after a case was resolved to enter an order regarding discovery. *See Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 781 (1st Cir. 1988) ("The district court's judgment . . . was a final dismissal on the merits. . . . It left no substantive issue unresolved . . . Under these circumstances, *we think that the court simply lacked power to impose any new, affirmative requirements on the parties relating to discovery*") (emphasis added). Since OCM is not attacking the district court's "power" to enter protective orders, *Liggett* has no application.

*In re "Agent Orange" Prod. Liab. Litig.*, 821 F.2d 139 (2d Cir. 1987) concerned a district court's authority to modify a protective order "as discovery progresse[d]." *See In re "Agent Orange" Prod. Liab. Litig.*, 821 F.2d 139, 144 (2d Cir. 1987) ("[In] support of the [protective] order, the special

master noted that it might be desirable to lift the order 'as discovery progresses and fundamental issues are resolved. . . . ' [A]ppellants were on notice virtually from the time it was issued that the district court's order might be lifted or modified"). Despite its claim of carefully monitoring litigation of agri-businesses, OCM's efforts came nearly *two years* after this litigation arose and only then it was *after* trial and settlement of the case.

*Davis v. E. Baton Rouge Parish Sch. Bd.*, 78 F.3d 920 (5th Cir. 1996) concerned the failure of the district court to give notice of potential entry of a protective order to "news agencies" who were interested in the entry of such an order. *See Davis v. E. Baton Rouge Parish Sch. Bd.*, 78 F.3d 920, 931 (5th Cir. 1996) Unlike *Davis*, OCM makes no complaints with respect to notice given to it or others. Indeed, OCM conspicuously avoids addressing why it failed to enter this action for nearly two years after it was publicly disclosed in industry media and then only after trial and settlement of the action.

Contrary to OCM's contention, *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325 (D.C. Cir. 1985) merely reaffirmed the long-standing rule that issues bearing upon confidentiality and sealing court documents is "best left to the sound discretion of the trial court." *See In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1339 (D.C. Cir. 1985) ("[The action of the litigant] could indeed have been thought to suggest a particularly high need for confidentiality with respect to the documents remaining. What view to take was assuredly one of those matters regarding access 'best left to the sound discretion of the trial court' ").

Finally, *United States v. Amodeo*, 71 F.3d 1044 (2d Cir. 1995) is a criminal case and necessarily invokes different rights with respect to third party access to criminal (not civil) actions. *United States v. Amodeo*, 71 F.3d 1044, 1053 (2d Cir. 1995) ("The subject matter . . . [of] conduct in the face of criminal elements . . . thus is such that the firm might reasonably have expected some public scrutiny").

OCM argues that "[a]ccording to the Eighth Circuit, nonparties without a stake in the underlying litigation – such as newspapers, journalists, and public interest organizations like OCM – are never permitted to intervene to challenge protective orders barring public access to judicial proceedings." *See* OCM's Petition at 8. OCM wholly misreads the Eighth Circuit's decision.

The Eighth Circuit's *ratio decidendi* stems *only* from a "review [of] the district court order denying the motion for permissive intervention for abuse of discretion" (OCM's Petition at A4). The Eighth Circuit held "the district court did not abuse its discretion because the motion did not raise a claim or defense that shared a common question of law or fact with the underlying litigation" (OCM's Petition at A6). This holding evaluated only the discretion of the district court; it did not address whether "newspapers, journalists, and public interest organizations like OCM" would **ever** be allowed to "intervene to challenge protective orders." OCM's argument is in error.

OCM's Petition should be denied.

## CONCLUSION

There is no need for this Court's review. The issue of whether the District Court abused its discretion in denying the Motion to Intervene is a straight forward question that was fully and adequately considered by the Eighth Circuit without dissent. No conflict in the Courts of Appeals exists on the abuse of discretion applicable here. OCM's Petition should be denied.

Respectfully submitted,

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